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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,
Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,
Appellees.

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Appellant,

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE ATTORNEY GENERAL OF THE STATE OF NEW YORK

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Opinions Below

The opinion of the New York Court of Appeals in the consolidated cases is reported at 20 N. Y. 2d 370, 229 N. E.

2d 602, 283 N.Y.S. 2d 31, and is set forth in the Appendix (A. 42-43; 134-135).* The order of the Appellate Division, First Department in the proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules is reported at 26 A. D. 2d 992, 275 N.Y.S. 2d 363, and is set forth at page 38 of the Appendix. The opinion of the Appellate Division, First Department, in the plenary action is reported at 26 App. Div. 2d 912, 275 N.Y.S. 2d 365, and is set forth at pages 128-129 of the Appendix. The opinion of the Supreme Court in the Article 78 proceeding is reported at 48 Misc. 2d 544, 265 N.Y.S. 2d 304 (A. 32-34). The opinion of the Supreme Court in the plenary action is not officially reported (A. 124-125). The order of the Appellate Division, First Department, granting leave to the Attorney General to intervene pursuant to N. Y. Executive Law § 71, is reported at 26 A. D. 2d 778.

Jurisdiction

The order of the New York Court of Appeals was entered on July 7, 1967 (A. 39-41; 131-133). The notices of appeal were filed on September 18, 1967 (A. 44-46; 136-138). The jurisdictional statement was filed on October 2, 1967. Probable jurisdiction was noted on January 29, 1968 (A. 47; 139).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

Constitutional and Statutory Provisions Involved

United States Constitution, amends. V, XIV; N. Y. Public Authorities Law §§ 2601-3 (Appellant's Appendix pp. 21-24).

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* Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix.

Questions Presented

1. Is N. Y. Public Authorities Law § 2601 unconstitutional insofar as it provides that, where an officer of a corporation refuses to waive immunity before a grand jury with respect to public contracts into which it has entered, the corporation of which he is an officer may not continue to hold existing contracts or secure new ones for a period of five years?

2. May appellant corporation avoid the conditions of the contracts it entered into with appellee?

3. Is the decision of the Court of Appeals final with respect to appellant's claim that it may not contract with the State of New York?

4. May appellant corporation assert for itself the personal self-incrimination and due process rights of George Campbell, Jr.?

Statement of the Case

During 1964, the appellant, a closely held family corporation, entered into three painting contracts with the appellee New York City Housing Authority. Each contract contained a standard paragraph 38 in accordance with Public Authorities Law § 2601, providing that, where a person refuses to sign a waiver of immunity when requested to appear before a grand jury to testify concerning public contracts, such person and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified for five years from bidding on public contracts and any existing contracts shall be terminated (A. 3-4; 51; 79-80). All three contracts were executed on behalf of the appellant by its president, George Campbell, Jr., who was also a director and stockholder of the corporation (A. 79).

Early in 1965, appellant's officers, including its president, became aware that the District Attorney of New York County was conducting an investigation before a Grand Jury to determine whether the crime of bid rigging on public contracts, including those entered into by appellant, had occurred in New York County (A. 51-52; 85). On March 26, 1965, George Campbell, Jr. purported to resign as president and director of the appellant corporation and to turn over his shares of stock (A. 52, 56, 67). On the same date he became employed as an "estimator" by the appellant corporation (A. 5, 67).

The resignation was specifically arranged by the corporation to circumvent the express provisions of the contract containing the statutory language. The papers in the plenary action alleged that Campbell became aware of the Grand Jury investigation of appellant corporation on March 26, 1965, and was advised by counsel that he "could expect to be subpoenaed and requested to waive statutory immunity" (A. 51-52).

The officers of appellant corporation were advised by the corporation's counsel "of the penalty that would result if any of us refused to waive immunity". Strangely, of all the officers and directors, only Campbell, "then only twenty-four years of age, and having the fewest years of service with the company, deemed it advisable to refuse to waive immunity", and he was, therefore, requested to offer and did offer his resignation (A. 52).

On Friday, April 9, 1965, after Mr. Campbell allegedly had already been employed by appellant in his new capacity, the Board of Directors of appellant allegedly met and purported to accept his resignation (A. 52, 55). On April 13, Mr. Campbell was served in the office of the corporation's lawyer with the subpoena (A. 52). On April 14, the Grand Jury met. In accordance with his corporate arrangement, he refused to sign the statutory waiver of

immunity and, consequently, was not asked to testify (A. 52-53).

By letter dated April 16, 1965, the New York County District Attorney informed the Housing Authority that Campbell had refused to sign such a waiver of immunity. On April 21, 1965, the Authority advised appellant that, pursuant to § 38 of the general conditions of the contracts, the contracts were cancelled and terminated effective immediately and that Mr. Campbell and the corporation were disqualified from doing business with the Authority for the five years (A. 16-17; 57-58).

Appellant commenced an action by way of an order to show cause for an order *pendente lite* enjoining the Housing Authority from barring or disqualifying appellant from future bidding and directing restoration of its name to the qualified bidder list (A. 49). Appellee Housing Authority cross-moved to dismiss and the motion was granted only to the extent of staying the action pending determination of appellant's appeal from an order of the Supreme Court, New York County granting appellees' motion to dismiss the petition in a proceeding pursuant to Article 78 of the N. Y. Civil Practice Law and Rules (A. 122-123). The Article 78 proceeding was for an order annulling the Housing Authority's determination barring and disqualifying appellant from public contracts for five years. The motion was granted without prejudice to the commencement of a plenary action (A. 32-34).

On appeal to the Appellate Division, First Department, the order in the Article 78 proceeding was affirmed without opinion (A. 37-38). On the same date, on cross appeals, the order in the plenary action was modified in an opinion which stated in pertinent part that:

> "The complaint is insufficient because plaintiff is subject to the contractual agreements it made and because on the present allegations plaintiff does not establish a case for equitable relief." (A. 130)

On consolidated appeals, the New York Court of Appeals held that Public Authorities Law § 2601 is constitutional citing *Matter of Gardner* v. *Broderick*, 20 N. Y. 2d 227, 229 N. E. 2d 184, probable jurisdiction noted No. 635, Oct. T. 1967, decided the same day (A. 42, 134). The Court held the disqualification to be valid. The Court further held that the fact that the appellant's officer resigned prior to his appearance before the Grand Jury was not controlling where the resignation was virtually contemporaneous with his refusal to sign the waiver of immunity and where it was obvious that the sole purpose of the resignation was to avoid the statutory disqualification. The Court held that while there might be times when the statute might penalize a corporation which "had severed its connection with the recalcitrant officer and which has otherwise been cooperative", the Legislature had provided a procedure for the removal of such disqualification (Public Authorities Law § 2603). The Court concluded that "the appellant's exclusive remedy is the procedure outlined in that statute" (A. 43, 135).

Summary of Argument

N. Y. Public Authorities Law § 2601 provides that each public contract provide for a five-year disqualification from such contracts and the cancellation of existing contracts of any corporation whose officers refuse to sign a waiver of immunity when called to testify before a grand jury with respect to those contracts. The statute was passed to further the express State purpose of insuring that its contracts go to "the lowest responsible bidder." The aim of the statute is to require candor of those who would do business with the State with respect to that business and thus to protect the public fisc. The requirement of candor is thus reasonably related to a valid State purpose.

The decisions of this Court with respect to the Fifth Amendment privilege against self-incrimination do not

alter the validity of the requirement of candor. The statute is not a penalty for invoking the privilege but a valid requirement in and of itself. After *Garrity* v. *New Jersey*, 385 U. S. 493, the privilege is completely insulated since no testimony obtained under compulsion from the individual can be used in criminal proceedings against him. *Spevack* v. *Klein*, 385 U. S. 511, holding that the privilege is available to an attorney, simply represents a situation where its invocation could not be the basis for disbarment where the information might not be required and where the attorney did not stand in a special relationship to the State. Moreover, the result, stripping the attorney of his license and livelihood, did not seem required by the refusal to divulge. Debarment from public contracting is an appropriate response to a refusal to divulge contract information.

Since the relationship between the State purpose and the statutory requirement is reasonable, the requirement may be included in a State contract. In any event, appellant, having accepted the benefit of the State contract, cannot be heard to complain that one of its provisions is unconstitutional. The time to complain was before the contracts were signed. The right to complain has been waived by the contract.

Appellant's claim that, whatever the validity of the disclosure requirement, it cannot be disqualified because the offending officer, George Campbell, Jr., is no longer in a position of control in the corporation, has not been finally adjudicated by the State courts. The Court of Appeals held that the "exclusive remedy" to test this claim is a proceeding pursuant to N. Y. Public Authorities Law, § 2603. The determination of the Court of Appeals is, thus, not a "final" adjudication within the meaning of 28 U.S.C. § 1257. Moreover, the determination of the Court of Appeals rests on an independent and adequate State ground.

In seeking to circumvent the requirement of candor, appellant bases its primary reliance on the Fifth Amend-

ment privilege against self-incrimination of George Campbell, Jr. That privilege not only was not violated (Point I, *infra*), but it is personal to Mr. Campbell. Appellant has no such privilege of its own and cannot invoke his. This is not a case where one person's rights can be vindicated only if another asserts them. Here, the corporation insists that the sanction against it *is* the violation of the rights of another. In fact, no such violation has occurred.

POINT I

The disqualification provisions of New York Public Authorities Law § 2601 are reasonably related to a valid State purpose and are constitutional. In any event, appellant may not now challenge the conditions of the contracts into which it entered.

This Court has established that inquiry into the validity of legislation, "where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assured afford support for it." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154. See also, *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 596; *Matter of Van Berkel* v. *Power*, 16 N. Y. 2d 37, 40 (1965).

It is undeniable that the State has the power and the duty to protect the welfare of its people (*City of El Paso* v. *Simmons*, 379 U. S. 497, 508-509; *East New York Savings Bank* v. *Hahn*, 326 U. S. 230, 232-33), and that corrupt practices in the obtaining and execution of public contracts are inimical to that welfare. The State policy with respect to the letting of public contracts is typified in N. Y. State Finance Law § 174, providing, *inter alia*, that such contracts:

> "shall be let to the lowest responsible bidder, as will best promote the public interest, taking into consideration the reliability of the bidder, the qualities of

> the articles proposed to be supplied, their conformity with the specifications, the purposes for which required and the terms of delivery; provided, however, that no such contract shall be let to a bidder, other than the lowest responsible bidder without the written approval of the comptroller . . . . Each bid with the name of the bidder shall be entered of record and each record, with the successful bid indicated, shall be open to public inspection."

To the same effect are, *e.g.*, N. Y. General Municipal Law § 103; N. Y. Highway Law, § 38; N. Y. Education Law, § 2556(10). See also N. Y. Public Housing Law, § 151. It is of the highest importance in New York that there be no collusive bidding or bid rigging for public contracts. Thus, every public contract requires proper assurance to that effect as one of its conditions. See e.g., N. Y. General Municipal Law § 103-d; N. Y. Public Authorities Law, § 2604; N. Y. Public Housing Law, § 151; N. Y. State Finance Law, § 139-d. Indeed, collusive bidding is a crime. N. Y. General Municipal Law, § 103-e.* Of course, other aspects of contractor misconduct may also be crimes or sufficient basis to breach the contract. The federal requirement is similar. A "certification of independent price determination" clause must be set out in almost all bids for government contracts. 41 C.F.R. § 1-1.317.

The object of the New York bidding laws is "the benefit and protection of the public". *Matter of Zara Contracting Co. Inc.* v. *Cohen*, 45 Misc. 2d 497, 499, 257 N.Y.S. 2d 479 (Sup. Ct. Albany Co. 1964), *aff'd.* 23 A. D. 2d 718, 257 N.Y.S. 2d 118 (3rd Dept.), *lv. to app. den.* 16 N. Y. 2d 482 (1965). A determination as to the lowest responsible bidder, for example, requires a determination of "integrity and moral worth". *Matter of Caristo Constr. Corp.*

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* George Campbell, Jr. himself has pleaded guilty to this crime with respect to the contracts in question. Sentencing is presently set for April 16, 1968.

v. *Rubin,* 30 Misc. 2d 185, 198, 221 N.Y.S. 2d 956, 969 (Sup. Ct. Kings Co.), *aff'd.* 15 A. D. 2d 561, 222 N.Y.S. 2d 998 (2d Dept. 1961), *aff'd.* 10 N. Y. 2d 539, 225 N.Y.S. 2d 502; *Matter of Arglo Painting Corp.* v. *Board of Education,* 47 Misc. 2d 618, 620-21, 263 N.Y.S. 2d 124 (Sup. Ct. Kings Co. 1965); *Picone* v. *City of New York,* 176 Misc. 967, 29 N.Y.S. 2d 539 (Sup. Ct. N.Y. Co. 1941); *Matter of Limitone* v. *Galgano,* 21 Misc. 2d 376, 189 N.Y.S. 2d 738 (Sup. Ct. Westch. Co. 1959). Almost all federal government contracts must contain a provision that the contractor agrees to let the Comptroller General and his representatives examine all records directly pertaining to and involving transactions relating to the prime contract or subcontract for a period of three years from final payment. 10 U.S.C. § 2313(b); 41 U.S.C. § 254(c). And the federal contracting officer must be able to assess the responsibility of the contractor. 41 C.F.R. § 1-1.310-1-11; 1-1.310-5(4). See *United Public Workers* v. *Mitchell,* 330 U. S. 75. See also 2 McBride & Wachtell, Government Contracts, p. 10-73.

In order to determine whether or not bidders and contractors are responsible, the State must be able to insure candor on the part of public contractors and to protect the public from persons or corporations which refuse to be candid in their public dealings. This was precisely the legislative purpose in enacting Public Authorities Law, § 2601 and similar statutes.* In recommending the legislation, the New York State Attorney General said:

> "At the present time under Article I, Section 6 of the Constitution and Public Officers Law, Section 3-a, public officials who refuse to waive immunity are subject to removal from office and disqualified from holding any other public office for five years from the

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* N. Y. General Municipal Law § 103-a, b; N. Y. State Finance Law § 139-a, b; N. Y. Public Housing Law, § 151; N. Y. Public Authorities Law, § 2602.

time of refusal. There is every reason why the same disqualification should apply to people doing business with and profiting by business dealings with government.

The Extraordinary Grand Jury conducting an investigation in Ulster County, on January 28, 1959 handed up a presentment pointing out that its inquiry had been blocked by the refusal of persons who had been selling merchandise and equipment to the county to give testimony about their dealings with public officials. It recommended legislation to meet that problem. This bill is such legislation." *Memorandum of the Attorney General,* NEW YORK STATE LEGISLATIVE ANNUAL (1959), p. 148.

In approving the new legislation, Governor Rockefeller pointed out:

"Unlike a private person who may contract with whom he wishes, a public agency usually lets contracts by public auction and is required to accept the lowest bid. For that reason, it would seem appropriate to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some prior contract with the public. Likewise, it would seem appropriate that public contracts should provide that the benefits accruing under them be available only so long as the beneficiary is willing, when required by a grand jury, to disclose any information he may have as to a public contract." *Memorandum of the Governor,* NEW YORK STATE LEGISLATIVE ANNUAL (1959), p. 431.

See *United States* v. *Acme Process Co.,* 385 U. S. 138, 144.

There is, thus, a strong state policy and interest in honest contracting. It is a *sine qua non* of overseeing con-

tractors that they be required to supply appropriate officials with continuing information with respect to their contracts. "[I]t would be difficult to gainsay the reasonableness of the state's effort to impose legislatively upon those with whom it does business a continuing duty of candor and disclosure concerning their transactions with the state". *Holland* v. *Hogan*, 272 F. Supp. 855, 869 (S.D.N.Y. 1967) (3 Judge Court), appeal pending Oct. T. 1967, No. 653. See also *United States ex rel. Laino* v. *Warden*, 246 F. Supp. 72, 93-94 (S.D.N.Y. 1965), *affd.* 355 F. 2d 208 (2d Cir. 1966).

This Court has consistently upheld the right of a State to exact candor of its public employees. *Nelson* v. *Los Angeles*, 362 U. S. 1; *Beilan* v. *Board of Public Education*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468, *reh. den.* 358 U. S. 858; *Slochower* v. *Board of Higher Education*, 350 U. S. 551; *Garner* v. *Board of Public Works*, 341 U. S. 716. This duty of candor derives from the nature of the relationship between public employee and employer and the nature of the relationship between the information sought and the employment. The public contractor stands at least in no less special a relationship to the state than does the public employee (*United States ex rel. Laino* v. *Warden, supra*, at 94), and the nature of the information sought must by law relate to the public contracts.

Appellant appears to concede the closeness of the relationship between its position as a contractor and the nature of the information required, but adopts instead the extraordinary position that the Fifth Amendment decisions of this Court, have obviated the distinction between reasonable and unreasonable disclosure requirements and have, in effect, insulated it from any such requirements at all (Br. for appellant, pp. 9-14). Even if appellant could raise a Fifth Amendment claim, which it cannot (Point III, *infra*), the result it seeks, if accomplished, would be folly. In fact, it is unwarranted by any decision of this

Court or by any cogent rationale. In protecting the privilege against self-incrimination available to public employees (and free speech, see e.g., *Keyishian* v. *Board of Regents,* 385 U. S. 589), the general concern has been that no one be compelled to give testimony which would subject him to criminal penalty. None of those cases involved the government's right to information. The nub of the holding of those cases is that the government does not have a right to compel from the individual information which can be used to convict him of a crime. It does have a right to information relating to government employment or contracts.

Long before the privilege against self-incrimination was held applicable to the States, this Court recognized that mere invocation of the privilege should not lead in every instance to consequences as a penalty for invoking the privilege. *Slochower* v. *Board of Higher Education, supra.* There, the Court held that Prof. Slochower, under the particular facts of that case, should have the opportunity to explain his refusal to testify before a congressional committee and to demonstrate that it bore no relation to his teaching capacity (*id.* at 556, 558).

Obviously, New York Public Authorities Law, § 2601, is not a penalty for mere invocation of the privilege but a protection for the state against contractors who refuse to be candid. *United States ex rel. Laino* v. *Warden, supra* at 94. See *Copper Plumbing & Heating Co.* v. *Campbell,* 290 F. 2d 368 (D. C. Cir. 1961); 41 C.F.R. § 1-1.601. The refusal to waive immunity is not taken as a confession of guilt of any wrongdoing. It is the refusal to provide required information itself which operates to disqualify where the information may be required and where individual criminal consequences may not result.

Thus, this Court has held in *Spevack* v. *Klein,* 385 U. S. 511, relied upon by appellant, that an attorney admitted to State practice could invoke the privilege against self-

incrimination in a disbarment inquiry. It did not hold that the might not be required to produce certain information relative to his professional integrity. But there, the attorney-licensee stood in no special relationship to the State (concurring opinion at 519-20) and had not had an opportunity to demonstrate whether or not it was within the power of the investigating body to demand the information (*id.* at 518-19) and most significantly the consequences of disbarment are catastrophic for an attorney (*id.* at 516).

In dealing with public contractors, this Court long ago held, in *McMullen* v. *Hoffman*, 174 U. S. 639, 651, that public contracts cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and bona fide bids. The consequences of disqualification of a contractor from public bidding are minimal as compared to the dismissal of a career public employee or the disbarment of an attorney or even the revocation of an ordinary public license. The disqualification of the contractor does not affect his ability to engage in his business. Thus, the appellant by the disqualification was not barred thereby from continuing to engage in the painting business in the City of New York.* Thus, even more than in the case of a public employee, or an attorney whose professional career can be terminated for failure to furnish relevant information or that of any other public licensee, the requirement invoked here was most clearly a reasonable and fair condition to which the public contractor agreed in entering into the public contract. Debarment from public

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* It must not be overlooked that the painting contracts concerned in the present case involved subsidized public housing operated by a governmental authority in a proprietary capacity. Any failure of the bid system because of collusion or otherwise to produce the lowest responsible bid would be reflected in excessive rents to tenants having already meagre earnings.

contracting is a proper exercise of government power to regulate contractor responsibility. See *United States* v. *Acme Process Co.*, 385 U. S. 138.

Furthermore, even were the individual privilege against self-incrimination involved here, this Court, far from removing disclosure requirements on the part of public employees and contractors, has now facilitated the acquisition of information and provided for the protection of both the individual and the State. *Garrity* v. *New Jersey*, 385 U. S. 493. By holding that any information elicited from such an individual may not be used against him in criminal proceedings, the Court has removed any bar to requiring that information for a valid state purpose not penal or quasi-criminal in nature.

After *Garrity*, even if a waiver of immunity were signed, any information elicited could not be used to prosecute for a substantive crime. *People* v. *Goldman*, 21 N. Y. 2d 152, 234 N. E. 2d 194 (1967). Hence, the only basis for refusal to sign would be to protect the corporation from the effect of any testimony, not the individual. It is not necessary, in protecting the privilege against self-incrimination also to place the State in the position of being unable to continue the duty of candor and to be required to pay from the public treasury contractors who decline to discuss their contracts. The contractor is not required to sacrifice a constitutional right to protect his contracts. Certainly he cannot be heard to say that if he tells the truth about those contracts he no longer will be entitled to public moneys. See *Piemonte* v. *United States*, 367 U. S. 556, 559 n. 2; *Ullmann* v. *United States*, 350 U. S. 422, 431; *Brown* v. *Walker*, 161 U. S. 591, 600.

Because the requirement involved here is reasonably related to the end it is designed to achieve and because that end is valid, its inclusion in a contract is not unconstitu-

tional. See e.g., *Atkin* v. *Kansas*, 191 U. S. 207; Walsh-Healey Act (41 U.S.C. §§ 35-45). Davis-Bacon Act (40 U.S.C. §§ 276a-c); Service Contract Labor Standards Act (41 U.S.C. §§ 351-57); 41 C.F.R. § 1-12.803, *cf. Frost Trucking Co.* v. *R. R. Comm.*, 271 U. S. 583, in which the regulation was held not reasonably related to the announced statutory purpose. Certainly the State may require of a contractor a condition reasonably related to the advancement of the public welfare. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *People* v. *Crane*, 214 N. Y. 154, 168, *aff'd. sub nom. Crane* v. *New York*, 239 U. S. 197.

In any event, appellant should be held bound by the contracts it signed. This was the view enunciated by the Appellate Division of the Supreme Court, First Department (A. 130). It was a condition of the contracts, a condition of which all of appellant's officers and directors obviously were well aware, that, upon the refusal of any one of them to testify before a Grand Jury concerning the contracts they were obtaining, disqualification and cancellation would result. The corporation fully and freely, in order to obtain an economic advantage over its competitors, who were public bidders, thereby agreed to procure its officers' waiver of any Fifth Amendment objection to the continuing availability to the state or its investigating agency of information relative to the contracts. Appellant, thus having agreed to the contracts subject to this condition to obtain the benefits thereof, cannot be heard to complain now that it has breached such condition in the contract. *Fahey* v. *Malonee*, 332 U. S. 245, 255-256; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348 (concuring opinion); *Booth Fisheries* v. *Industrial Comm.*, 271 U. S. 208; *Buck* v. *Kuykendall*, 267 U. S. 307; *Campbell* v. *City of New York*, 244 N. Y. 317, 155 N. E. 628. See *Dennis* v. *United States*, 384 U. S. 855, 865. Whether or not the State could have required the waiver of a constitutional right (*Stevens* v. *Marks*, 383 U. S. 234,

243 and see *Regan* v. *New York,* 349 U. S. 58; *United States* v. *Field,* 193 F. 2d 92 [2d Cir. 1951], *cert. dism.* 342 U. S. 908), it was not required here since any information obtained from the individual could not have been used against him and since the corporation had no privilege to waive (Point III, *infra*).

Moreover, if appellant deemed the condition unreasonable and regarded itself as otherwise entitled to the contracts in question, the time to complain was *before* the contracts were signed and the proper procedure was by way of a proceeding in the nature of mandamus pursuant to Article 78 of the New York Civil Practice Law and Rules. See e.g., *Dictaphone Corporation* v. *O'Leary,* 287 N. Y. 491, 41 N. E. 68 (1942). Having failed to raise the question at the proper time, appellant has waived, by contract, all right to raise it now.

POINT II

The propriety of the disqualification of appellant corporation has not been finally adjudicated by the State Courts. Accordingly, the decision of the New York Court of Appeals is not final. The refusal of the Court of Appeals to reach the issue rests on an independent and adequate State ground.

The only issues which directly concern appellant in the instant case are whether a reasonable condition was imposed on it and whether or not any circumstances exist which would make the otherwise reasonable condition unreasonable with respect to it. As we have said, the condition is reasonable and necessary and, in any event, appellant has waived the right to challenge the application of such condition in the contract (Point I, *supra*).

Appellant, nevertheless, contends that notwithstanding the reasonableness of the condition, it was a denial of due process to disqualify it on the basis of Mr. Campbell's

refusal to waive immunity since Mr. Campbell resigned his presidency of appellant before the disqualification. Under the facts of their case (*supra*, pp. 3-5) the contention is, indeed, bizarre. In any event, it is the ordinary rule that the acts of an officer are imputed to the corporation. *United States* v. *Acme Process Co.*, 385 U. S. 138, 147. Nor should Mr. Campbell's resignation relieve appellant of its contract where the resignation obviously was designed to head off investigation by the public authorities. The Court of Appeals so held in this case. However, the Court made no factual findings with respect to whether or not appellant should be relieved of its disqualification. It held, rather, that for removal of the disqualified, a proceeding under Public Authorities Law, § 2603 is "appellant's exclusive remedy". 20 N. Y. 2d at 377.

That section provides for a special proceeding in the State Supreme Court to remove the disability on a petition:

> "[S]etting forth grounds, including that the cooperation by petitioner with the grand jury at the time of the refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or corporation by the member, partner, officer or director who refused to waive immunity is such that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification. . . ."

See also N. Y. General Municipal Law § 103-c; N. Y. State Finance Law, § 139-c.

Appellant, here raising the specific (though not exclusive) issue contemplated by the statute, has not instituted a § 2603 proceeding. Thus, the judgment of the New York Court of Appeals is not final within the meaning of 28 U.S.C. § 1257 with respect to the propriety of the disqualification of appellant. The highest court of the State has pointed out appellant's "exclusive remedy". While

this disposition was not a remand, the effect was the same, to require further proceedings on the issue raised. Moreover, the Court did not direct the result of such a proceeding. It would be open to appellant to establish the facts it alleges. Contrast *Mills* v. *Alabama*, 384 U. S. 214, 217-18; *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 382. Consequently, the determination by the Court of Appeals is not "the final word of a final court". *Market Street Railway Co.* v. *Commission of California*, 324 U. S. 548, 551. See also *Republic Natural Gas Co.* v. *State*, 334 U. S. 62; *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543; *Arnold* v. *United States*, 263 U. S. 427.

The State proceeding contemplated is fully adequate to deal with appellant's claims in a manner consistent with due process of law being, in fact, a full-scale judicial proceeding. The proceeding contemplated may be instituted before or after definitive action is taken when the corporation "has become subject to the cancellation or termination of a contract or disqualification to contract." Even if the hearing was available only after disqualification, appellant would not be deprived of due process of law. *South Carolina* v. *Katzenbach*, 383 U. S. 301; *Lerner* v. *Casey*, 357 U. S. 468; *Bowles* v. *Willingham*, 321 U. S. 503, 520. Indeed, a federal agency may suspend a firm or individual for a temporary period while investigating charges with only a written notice. 41 C.F.R. § 1-1.605—1-1.605.4.

Finally, the refusal of the Court of Appeals to consider the propriety of the instant disqualification rests on the independent and adequate state ground that the proper procedure was not followed. Accordingly, the case is not properly before this Court. *Wilson* v. *Loew's Inc.*, 355 U. S. 597; *Herb* v. *Pitcairn*, 324 U. S. 117, 125-126; *Fox Film Corp.* v. *Miller*, 296 U. S. 207. See *Cramp* v. *Board of Public Instruction*, 368 U. S. 278.

POINT III

Appellant corporation has no interest in and can derive no benefit from Mr. Campbell's privilege against self-incrimination.

Having disclaimed with strong emphasis Mr. Campbell and all of his acts, appellant corporation nevertheless erroneously seeks to invoke, for its own benefit, his privilege against self-incrimination. Thus, appellant contends that the question in the instant case is whether the assertion of the privilege against self-incrimination by Mr. Campbell may result in its disqualification for five years from bidding on public contracts. But this contention has no plausible basis. Appellant is confusing any individual rights of Mr. Campbell with its own rights. Depending on the facts, two basic claims might be open to Mr. Campbell were he a party to this proceeding. He might allege that his privilege against self-incrimination entitles him not to have coerced testimony introduced against him in a criminal proceeding and he might allege that he has a right not to suffer any penalty merely for having invoked his privilege against self-incrimination.

However, since Mr. Campbell did not testify, the first possibility did not arise. Contrast *Garrity* v. *New Jersey*, 385 U. S. 493. Moreover, had he testified, that testimony would be available for use against the appellant corporation. *United States* v. *White*, 322 U. S. 694. Consequently, appellant could not assert Mr. Campbell's rights to advance any claim on its own behalf. For, even had his testimony been offered against Mr. Campbell, it would be excludable only against him.

Of course, the proceedings contemplated would not give Mr. Campbell any claim with respect to the unfair imposition of a penalty (Point I, *supra*). But beyond that, the corporation has no interest in and can claim no derivative benefit from Mr. Campbell's privilege against self-

incrimination. *United States* v. *White, supra; Hale* v. *Henkel,* 201 U. S. 43; *United States* v. *Silverstein,* 314 F. 2d 789 (2d Cir.), *cert. denied* 374 U. S. 807. It cannot claim that any alleged impairment of Mr. Campbell's right to exercise the privilege gives it a right to assert the protection of his privilege for its own benefit. *In re Gibraltar Amusements Ltd.,* 291 F. 2d 22 (2d Cir. 1961), *cert. den.* 368 U. S. 925; *United States* v. *Guterma,* 272 F. 2d 344, 346 (2d Cir. 1959); *Lagow* v. *United States,* 159 F. 2d 245 (2d Cir. 1946). Any such right of Mr. Campbell would result from a claim of an unfair imposition of a penalty on him. The corporation cannot substitute the imposition of any alleged penalty on itself to complete the relationship required before Mr. Campbell could assert such claim of impairment.

The impairment of a personal right of necessity depends upon an identity between the one threatened and the one alleged to be harmed. Otherwise the right at issue, here the privilege against self-incrimination, simply is not violated. Moreover, since the corporation cannot, in any event, assert a privilege against self-incrimination (*United States* v. *White, supra*), it should not be permitted to do by indirection what it cannot do directly and assert for another a privilege it cannot assert for itself. Contrast *Zwick* v. *Freeman,* 373 F. 2d 110 (2d Cir. 1967), *cert. denied* 389 U. S. 835.

This case is, thus, wholly unlike *Pierce* v. *Society of Sisters,* 268 U. S. 510 and *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, relied on by appellant in its brief in opposition to the motion to dismiss or affirm, pp. 11-12. In *Pierce,* this Court held that a school could posit the right of the public to send students there and to pay it tuition. The public had the right to pay the money, the school the right to receive it. Here, only Mr. Campbell has a right to assert. No part of that right flows to the appellant. Thus, whatever appellant may claim, it may

not rely on any asserted violation of Mr. Campbell's rights. Indeed, none has been established.

In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, the organization asserted its own right to carry on as an organization without being subjected to listing as a subversive organization. *Id.* at 141. Indeed, the language quoted from the concurring opinion of Mr. Justice Jackson in that case in the brief in opposition to the motion to dismiss or affirm points up its inapplicability (*id.* at 187):

> "The Government proceeds on the basis that each of these associations is so identical with its members that the subversive purpose and intents of the one may be attributed to and made conclusive upon the other. Having adopted this procedure in the Executive Department, I think the Government can hardly ask the Judicial Department to deny the standing of the organizations to vindicate its members' rights."

Appellant is not seeking to vindicate Mr. Campbell's rights. It is urging that the existence of his rights gives it rights too, in its own behalf. In *Pierce*, the appellant had an independent economic right to solicit students from the public. Here, appellant relies on Mr. Campbell's right to *create* its own. In *Joint Anti-Fascist Refugee Committee*, the organization and its members were identical. Here, they are not. Indeed, appellant insists on this lack of identity by asserting that Mr. Campbell has severed all connection with it.

CONCLUSION

Since any claim by the appellant corporation that it has been denied due process of law must have a basis other than the privilege against self-incrimination, and since it has failed to establish any such basis, the decision of the New York Court of Appeals should be affirmed.

Dated: New York, New York, April 9, 1968.

Respectfully submitted,

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